Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED,

Petitioner,

-v-

WILLIAM NEIL SIMON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the bankruptcy discharge injunction set forth in section 524(a) of the Bankruptcy Code (11 U.S.C. § 524(a))[1] applies extraterritorially to enjoin the enforcement of foreign rights and remedies outside of the United States?

2. Whether principles of comity compel permitting courts outside of the United States to make an independent determination of the effect in the foreign country of a bankruptcy discharge granted in the United States?

3. Whether the filing of a proof of claim by a creditor in a United States bankruptcy case has the effect of causing the bankruptcy discharge injunction set forth in section 524(a) of the Bankruptcy Code to enjoin the creditor's extraterritorial enforcement of its rights and remedies when the section 524(a) discharge injunction would not otherwise have any extraterritorial effect?

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[1] All references to the Bankruptcy Code are in Title 11, United States Code.

PARTIES TO THE PROCEEDINGS

The parties below consisted of petitioner and plaintiff The Hongkong and Shanghai Banking Corporation Limited ("Hongkong Bank") and respondent and defendant William Neil Simon ("Simon").

RULE 29.1 LISTING

The following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Hongkong Bank have issued shares to the public:

COMPANY	COUNTRY OF INCORPORATION
Anglo United plc	England
Birse Group plc	England
The Cyprus Popular Bank Limited	Cyprus
Egyptian British Bank SAE	Egypt
HSBC Holdings plc	England
Hang Seng Bank Limited	Hong Kong
The Saudi British Bank	Saudi Arabia
Trinkaus & Burkhardt KgaA	Germany

Although they are both now wholly-owned subsidiaries of HSBC Holdings plc (the ultimate holding company), both Midland Bank plc, incorporated in England, and The Hongkong and Shanghai Banking Corporation Limited, incorporated in Hong Kong SAR, issued shares to the public prior to becoming wholly-owned subsidiaries within the HSBC Group.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit entered on August 27, 1998 (the "Ninth Circuit Order") is reported at 153 F.3d 991 (9th Cir. 1998). Appendix at 1a-18a. On September 10, 1998, Hongkong Bank filed a "Motion Of The Hongkong and Shanghai Banking Corporation Limited To Amend Opinion" (the "Motion to Amend"). The Motion To Amend was denied by the Ninth Circuit by order entered on November 9, 1998. Appendix at 19a. The order of the district court, entered on August 22, 1996 (the "District Court Order"), was unreported. Appendix at 20a-34a. The order of the bankruptcy court, entered on April 17, 1995 (the "Bankruptcy Court Order"), was also unreported. Appendix at 35a. The portion of the transcript of the April 12, 1995 hearing before the bankruptcy court in which the bankruptcy court announced its decision is contained in the Appendix at 37a-41a.

JURISDICTION

Invoking the jurisdiction of the bankruptcy court pursuant to 28 U.S.C. §§ 157, 1334 and 2201, and Rules 7001(6), 7001(7) and 7001(9) of the Federal Rules of Bankruptcy Procedure, and section 524(a) of the Bankruptcy Code, Hongkong Bank filed a Complaint For Declaratory Judgment Regarding The Debtor's Discharge (the "Complaint") on February 6, 1995. On April 17, 1995, the bankruptcy court entered the Bankruptcy Court Order, which dismissed with prejudice the Complaint based on the Motion to Dismiss filed by respondent Simon on March 9, 1995 (the "Motion to Dismiss").

The Bankruptcy Court Order was appealed to the district court pursuant to 28 U.S.C. § 158(a). The District Court Order affirming the Bankruptcy Court Order was entered on August 22, 1996. The District Court order was appealed to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 158(d). *See also* 28 U.S.C. § 1291. The Ninth Circuit Order affirming the District Court Order was filed on August 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

11 U.S.C. § 524(a) (1) and (2) provide:

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the ommencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

STATEMENT OF THE CASE

A. Background

The material facts are set forth in the Complaint filed by Hongkong Bank.[2] Simon conceded to the bankruptcy court that there are no material factual disputes in this proceeding.[3]

During the 1980's and early 1990's, respondent Simon built an international group of sporting goods, sportswear and outdoor gear companies headquartered in Hong Kong under the "Odyssey International" name. Simon's Hong Kong corporate empire was built on over $224 million of borrowed funds. The borrowed funds included $24 million that was loaned by petitioner Hongkong Bank to one of Simon's companies named Odyssey International Holdings Ltd., which Simon personally guaranteed under a guarantee that was executed in Hong Kong, was governed by Hong Kong law, designated a Hong Kong law firm as Simon's agent for service of process, stipulated that the courts of Hong Kong would have jurisdiction over all disputes under the guarantee, and was given to Hongkong Bank in Hong Kong as a Hong Kong bank (the "Guarantee").

While Simon was building his Hong Kong empire, he worked out of his Hong Kong headquarters building and he

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2 *See* Complaint, Appellant And Plaintiff The Hongkong And Shanghai Banking Corporation Limited's Excerpts Of Record -- Volume I (Documents 1-10) ("Appellant's Excerpts of Record"), pp. 1-12.

3 *See* Memorandum Of Points And Authorities In Support Of Motion To Dismiss, Appellant's Excerpts Of Record, p. 21

resided in Hong Kong. He met and married a woman that also resided in Hong Kong. Unfortunately, Simon's Hong Kong empire experienced substantial financial troubles in late 1992. One of Simon's Hong Kong companies was put into receivership in Hong Kong in January 1993. Then, when additional receiverships were imminent, Simon caused four of his companies -- Odyssey International Pty. Ltd., Odyssey Worldwide Holdings Ltd., Odyssey International Inc. and Odyssey of America Inc. -- to file chapter 11 petitions in the United States Bankruptcy Court for the Northern District of California on January 19, 1993.

B. Simon's Chapter 7 Case.

Shortly after Simon's Hong Kong companies filed chapter 11 petitions, on advice of counsel, Simon, who had retained his U.S. citizenship, left Hong Kong and started living in the United States. He subsequently filed his chapter 7 bankruptcy case on September 24, 1994 in the United States Bankruptcy Court for the Northern District of California. Simon was granted his chapter 7 discharge under sections 524(a) and 727(a) of the Bankruptcy Code. Simon's form discharge order was routinely issued by the bankruptcy court pursuant to section 524(a) of the Bankruptcy Code on January 29, 1995 (the "Discharge Order"). The text of the form Discharge Order is contained in the Appendix at 42a-43a.

Hongkong Bank did not file a proof of claim in Simon's chapter 7 case on account of Simon's obligations under his $24 million Hong Kong Guarantee in favor of Hongkong Bank. Hongkong Bank did file a proof of claim in Simon's chapter 7 case on account of Simon's personal guaranty of Hongkong Bank's share of over $200 million in

other borrowings that were loaned by a syndicate of banks, which included Hongkong Bank, to several other Odyssey International companies (the "Bank Group Claim").

C. The Present Adversary Proceeding.

Hongkong Bank intends to commence an action in the Hong Kong courts against Simon to enforce his $24 million Hong Kong Guarantee in favor of Hongkong Bank. Hongkong Bank stipulated in the Complaint that it will not enforce any judgment it obtains in Hong Kong against Simon in the United States. Simon, however, takes the position that the Discharge Order and section 524(a) of the Bankruptcy Code prohibit any action against him in the courts of Hong Kong on his Guarantee in favor of Hongkong Bank. Both the Discharge Order and section 524(a) of the Bankruptcy Code state that creditors are enjoined from enforcing prebankruptcy debts of Simon as personal liabilities of Simon.

Hongkong Bank maintains, however, that the Discharge Order and section 524(a) of the Bankruptcy Code do not apply extraterritorially to Hongkong Bank's proposed action in the courts of Hong Kong to enforce the Guarantee in favor of Hongkong Bank. Hongkong Bank also maintains that the rules of international comity should prohibit Simon and the bankruptcy court from sanctioning Hongkong Bank for any action in the Hong Kong courts to enforce the Guarantee in favor of Hongkong Bank.

Hongkong Bank does business in the United States and is subject to the jurisdiction of the bankruptcy courts. Accordingly, Hongkong Bank filed the Complaint to ensure that Hongkong Bank can enforce Simon's obligations in

Hong Kong under his Hong Kong Guarantee in favor of Hongkong Bank without being in violation of the Discharge Order and section 524(a) of the Bankruptcy Code. Specifically, Hongkong Bank sought a declaration that the Discharge Order and the statute on which it is based, section 524(a), which prohibit any action to collect from Simon personally on a prepetition debt, do not have extraterritorial effect. Alternatively, Hongkong Bank sought a judgment modifying the injunctions set forth in the Discharge Order and section 524(a) of the Bankruptcy Code to permit Hongkong Bank's proposed enforcement action against Simon in the courts of Hong Kong based on principles of comity and international law. Finally, Hongkong Bank sought a judgment ordering that Hongkong Bank could not be sued for contempt or damages in the United States for violating the Discharge Order or section 524(a) if it sought to enforce the Hong Kong Guarantee in favor of Hongkong Bank in the courts of Hong Kong.

D. The Bankruptcy Court's Ruling.

On April 17, 1995, pursuant to Simon's Motion to Dismiss, the bankruptcy court dismissed the Complaint and entered the Bankruptcy Court Order. The bankruptcy court held that the Discharge Order and section 524(a) enjoined Hongkong Bank in Hong Kong, and that extraterritoriality was not an issue, because the bankruptcy court has jurisdiction to sanction Hongkong Bank in the United States for any conduct in Hong Kong. Appendix at 37a-41a.

E. The Appeal To The District Court.

On April 27, 1995, Hongkong Bank filed a notice of appeal to the district court from the Bankruptcy Court Order. On August 22, 1996, the district court issued the District Court Order affirming the Bankruptcy Court Order, albeit for different reasons than those used by the bankruptcy court. The district court concluded that application of the Discharge Order and section 524(a) of the Bankruptcy Code to enjoin Hongkong Bank's efforts to enforce Simon's Hong Kong Guarantee in the courts of Hong Kong is not extraterritorial because Hongkong Bank filed the Bank Group Claim, even though Hongkong Bank did not file a proof of claim on account of the Hong Kong Guarantee that it seeks to enforce in Hong Kong, and even though Hongkong Bank stipulated that it would not seek to enforce in the United States any judgment obtained in Hong Kong. Appendix at 29a-33a.

F. The Appeal To The Court Of Appeals For The Ninth Circuit.

On September 25, 1996, Hongkong Bank filed a notice of appeal to the Court of Appeals for the Ninth Circuit from the District Court Order. On August 27, 1998, the Ninth Circuit issued the Ninth Circuit Order affirming the district court. The Ninth Circuit agreed with the district court that the fact that Hongkong Bank filed the Bank Group Claim was determinative. According to the Ninth Circuit, the fact that Hongkong Bank filed the Bank Group Claim made Hongkong Bank's proposed action in the courts of Hong Kong to enforce the Hong Kong Guarantee not extraterritorial. Appendix at 9a-11a.

REASONS FOR GRANTING THE WRIT

In an unsubtle example of results-oriented jurisprudence, the Ninth Circuit ignored statutory language, legislative history, and recent holdings of this Court to render an opinion that makes the United States a haven for international debtors by extending the statutory bankruptcy discharge injunction in section 524(a) of the Bankruptcy Code to operate extraterritorially in the absence of any supporting statutory language or underlying Congressional intent.

The Ninth Circuit's holding has enormous implications, especially in view of the present economic crises sweeping the globe. If upheld, the effect of the ruling will enable debtors to incur debts outside of the United States, seek refuge in the United States, file bankruptcy cases and discharge those debts in the United States (no matter how tenuous the connection of the borrower or the debts to the United States),[4] and then return to their home countries discharged from all preexisting debts without any requirement of filing bankruptcy proceedings in their home countries. Notwithstanding the applicable laws and policies of the countries whose laws govern the debts, creditors will be prevented from exercising any rights and remedies against these debtors in their foreign countries for fear they will be sued in the United States for violating section 524(a) of the Bankruptcy Code.

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[4] Pursuant to 11 U.S.C. § 109, any person that has any property in the United States may be a debtor under the Bankruptcy Code. Section 109 of the Bankruptcy Code has been interpreted to permit a Canadian resident whose only asset in the United States was $194 in a bank account to obtain bankruptcy relief in the United States. *In re McTague*, 198 B.R. 428 (Bankr. W.D.N.Y. 1996).

I. IN DIRECT CONFLICT WITH THE FUNDAMENTAL RULE OF STATUTORY CONSTRUCTION ESTABLISHED BY THIS COURT THAT STATUTES ARE PRESUMED NOT TO OPERATE EXTRATERRITORIALLY IN THE ABSENCE OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT, THE NINTH CIRCUIT DETERMINED THAT THE BANKRUPTCY DISCHARGE INJUNCTION SET FORTH IN SECTION 524(A) OF THE BANKRUPTCY CODE SHOULD BE APPLIED EXTRATERRITORIALLY

Not only is there absolutely no judicial precedent for the Ninth Circuit's ruling that the bankruptcy discharge injunction set forth in section 524(a) of the Bankruptcy Code enjoins conduct outside of the United States, but the ruling glaringly conflicts with this Court's recent holdings concerning the extraterritorial application of federal statutes. In *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("*Aramco*"), this Court followed longstanding precedent and held that there is a presumption that Congress intends all federal laws, like section 524(a) of the Bankruptcy Code, to apply only in the United States. According to this Court, the presumption can be overcome with respect to a particular statute only by evidence of a clear statement or

expression of Congressional intent that the statute should be applied extraterritorially to conduct or actions outside of the United States. *Aramco*, 499 U.S. at 248, 111 S.Ct. at 1230. This fundamental rule of statutory construction was reaffirmed by this Court once again in *Sale v. Haitians Centers Council, Inc.*, 509 U.S. 155, 173-74, 113 S.Ct. 2549, 2560, 125 L.Ed.2d 128 (1993). The instruction from this Court concerning the presumption against the extraterritorial effect of federal statutes could not be more clear.

In this case, however, the Ninth Circuit simply ignored the rule of statutory construction set forth in *Aramco* and *Sale* by applying section 524(a) of the Bankruptcy Code to Hongkong Bank's extraterritorial conduct without any evidence of Congressional intent, clear or otherwise, whether in the statute, its legislative history or anywhere else, that section 524(a) of the Bankruptcy Code should be applied to conduct or actions outside the United States. In fact, there is not a single supporting reference to statutory language or Congressional intent in the Ninth Circuit Order to support its holding.

To avoid the absence of any Congressional intent that section 524(a) be applied extraterritorially, as required by *Aramco* and other precedents of this Court, the Ninth Circuit interpreted the question as one of *jurisdiction* as opposed to *extraterritoriality*.

Initially, the Ninth Circuit followed the analysis used by the district court and analyzed the issues in terms of property of the estate and the *in rem* jurisdiction of the bankruptcy court. The Ninth Circuit held that, with respect to prebankruptcy property, the words "wherever located" in section 541(a) of the Bankruptcy Code and 28 U.S.C. § 1334 established that a debtor's prebankruptcy property, which

becomes property of the bankruptcy estate, is in the legal custody of the bankruptcy court and, therefore, the bankruptcy court has jurisdiction over that property both inside and outside of the United States. Appendix at 7a-9a. However, Hongkong Bank has always conceded and stipulated that it could not pursue such property. Therefore, the Ninth Circuit's lengthy discussion of *in rem* jurisdiction over property of the bankruptcy estate was entirely unnecessary.

Instead, Hongkong Bank sought guidance with respect to Simon's personal liability in Hong Kong and any property in Hong Kong that is not property of Simon's bankruptcy estate, which are not *in rem* issues and do not implicate section 541(a) of the Bankruptcy Code and 28 U.S.C. § 1334, notwithstanding the suggestion of the Ninth Circuit to the contrary. With respect to Simon's personal liability in Hong Kong, and the right of Hongkong Bank to pursue any property in Hong Kong that is not property of Simon's bankruptcy estate, the Ninth Circuit held as follows:

> The more difficult problem is whether a bankruptcy court may enjoin a foreign collection action against the debtor personally, or as to assets which do not form part of estate property, if the creditor was not a party to the United States bankruptcy proceedings. However, we need not squarely address that question because Hong Kong-Shanghai fully participated in the Simon bankruptcy, thus surrendering to United States jurisdiction. Because allowing a participating creditor to disregard bankruptcy court orders would have "substantial effects within the United States," *see Laker Airways*, 731 F.2d at 925, the

> presumption against extraterritorial effect does not apply.

Appendix at 9a.

The holding of the Ninth Circuit not only misapprehends fundamental principles of both bankruptcy law and international law, but completely begs the question. Procedurally, the Ninth Circuit confused the jurisdiction of the bankruptcy court to enforce the discharge injunction, which Hongkong Bank has always conceded, with the substantive question of whether the discharge injunction can apply outside of the United States. Bizarrely, the Ninth Circuit essentially held that if a United States court has jurisdiction over a litigant, any application of United States law to such a litigant is *ipso facto* not an improper extraterritorial application of United States law. This is not and cannot be the law. For instance, the defendant in *Aramco* was an American corporation that was sued in the United States for employment practices carried out in Saudi Arabia. There was no dispute that the district court had jurisdiction over the defendant, but this Court held that Title VII of the Civil Rights Act of 1964 did not apply to the defendant's conduct in Saudi Arabia.

The Ninth Circuit's utter confusion concerning the issue on appeal is evidenced by its holding that "allowing a participating creditor to disregard bankruptcy court orders would have 'substantial effects within the United States.'" Appendix at 9a. Aside from the fact that the Ninth Circuit did not list a single "substantial effect within the United States" that would allegedly occur if Hongkong Bank were permitted to enforce its rights and remedies in Hong Kong, the holding assumes the very fact at issue: Whether the discharge injunction applies extraterritorially to the proposed

conduct at all? If the injunction does not apply extraterritorially, and, therefore, does not enjoin extraterritorial conduct, in what sense would Hongkong Bank be "disregarding" the bankruptcy court's order if it sued Simon extraterritorially in Hong Kong?

In this case, Hongkong Bank has repeatedly stipulated that it was bound by the discharge injunction set forth in section 524(a) of the Bankruptcy Code and is subject to the jurisdiction of the bankruptcy court. Hongkong Bank stipulated that it would take no action on the Guarantee in the United States where the discharge injunction unquestionably applies. The only question presented by Hongkong Bank was whether Congress intended that the discharge injunction apply extraterritorially. By basing its decision on the fact of the bankruptcy court's jurisdiction over Hongkong Bank, and the filing of the Bank Group Claim, as opposed to an analysis of the statute at issue, the Ninth Circuit refused to apply the fundamental rule of statutory construction established by this Court that statutes are presumed not to operate extraterritorially in the absence of a clear expression of Congressional intent in order to reach a result unsupported by the language and legislative history of section 524(a) of the Bankruptcy Code.

As stated above, the implications of the Ninth Circuit Opinion are enormous. As the world economy becomes more integrated, and cross-border lending and other transactions increase exponentially, it is imperative that both creditors and debtors know what law governs the enforcement of their rights and remedies. In the present case, Hongkong Bank, a Hong Kong bank, loaned money to Simon's Hong Kong headquartered corporations to fund operations carried out in Asia, which loan was guaranteed by Simon, then a Hong Kong resident. The loan agreement and

the Guarantee are explicitly governed by Hong Kong law. The courts of Hong Kong are expressly granted jurisdiction over any dispute under the Guarantee. Facing financial difficulties, Simon filed bankruptcy in the United States, but not Hong Kong. While Hongkong Bank was always aware of the possibility that Simon could file bankruptcy in the United States, Hongkong Bank reasonably expected that if Simon wanted permanent debtor relief in Hong Kong (as opposed to the United States), he would be required to seek that relief in Hong Kong and be subject to the debtor-creditor laws of Hong Kong.

If the Ninth Circuit Order is upheld, debtors from around the world will attempt to obtain the newly-created, worldwide extraterritorial bankruptcy discharge under the United States bankruptcy laws. There is simply no evidence that Congress intended that section 524(a) make the United States an international debtor-haven. The Ninth Circuit should not be permitted to legislate its judicial policy choice in the absence of any supporting statutory language or expression of Congressional intent, clear or otherwise.

There is presently no conflict among the Circuits concerning whether or not the section 524(a) discharge injunction operates worldwide to make the United States an international debtor-haven. However, the lack of a Circuit conflict should not be determinative in whether or not to grant this petition for certiorari. Supreme Court Rule 10(c) provides that a compelling reason for granting a writ of certiorari is that a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The present case was contemplated by Rule 10(c). The Ninth Circuit Order and its implications are major topics of conversation in the international bankruptcy community. Because international debtors have almost unfettered discretion under very general rules for choosing the venue for a bankruptcy filing in the United States, all sophisticated international debtors will likely file for bankruptcy protection in the Ninth Circuit to gain the benefit of the Ninth Circuit's unprecedented formulation of a worldwide bankruptcy discharge. Therefore, there is a very real possibility that no other Circuit court will have the opportunity to address the issue for the foreseeable future.

Without statutory or judicial precedent, and in direct conflict with prior holdings of this Court, the Ninth Circuit has unilaterally decided that the United States should be an international debtor bankruptcy-haven. Such a decision should be made by Congress, not the Ninth Circuit. This issue is too important to be denied review by this Court because of the absence of a conflict among the Circuits that may never arise because of the many forum-shopping opportunities debtors are afforded with respect to the filing of bankruptcy cases in the United States.

II. THE NINTH CIRCUIT OPINION HAS CREATED A CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF COMITY PRINCIPLES TO TRANSNATIONAL BANKRUPTCIES

In direct conflict with fundamental rules of comity, international law and conflict of laws, the effect of the Ninth Circuit's improper extraterritorial application of section 524(a) of the Bankruptcy Code is to deprive the courts of Hong Kong of their sovereign right to adjudicate Hongkong Bank's rights under Simon's Hong Kong Guarantee and the effect in Hong Kong, if any, of Simon's bankruptcy discharge in the United States. The Ninth Circuit has arbitrarily determined that the bankruptcy laws of the United States should be binding on the courts of Hong Kong.

No other court of appeals has ever come close to adopting such an astonishing position. In fact, in *Maxwell Communications Corporation v. Societe Generale (In re Maxwell Communications Corporation)*, 93 F.3d 1036 (2d Cir. 1996), the Court of Appeals for the Second Circuit emphasized that principles of comity should govern the interrelationship between international law, extraterritoriality, and bankruptcy law.

In *Maxwell*, the debtor commenced simultaneous bankruptcy proceedings in both the United States and England. The debtor then sued to recover certain prepetition transfers made in England as preferential transfers pursuant to section 547 of the Bankruptcy Code. The

creditor argued that English preference law, not section 547, should govern. An underlying assumption made by all parties was that the transfers were not avoidable preferences under English law. The bankruptcy court and the district court held that section 547 does not have extraterritorial effect and, therefore, English law should govern. In affirming the district court decision, the Second Circuit held that, based on traditional principles of comity, England had a closer nexus to and interest in the challenged transactions and, therefore, English law should govern as a matter of comity and respect for the right of the English courts to adjudicate the matter.

In the present case, the Ninth Circuit dismissed comity concerns because of the absence of a competing bankruptcy proceeding in Hong Kong and the lack of a conflict between Hong Kong and United States law. Appendix at 11a-16a. The Ninth Circuit's holding was entirely circular and missed the point. On a purely practical level, there was no competing proceeding precisely because Simon was able to convince the Ninth Circuit that his United States bankruptcy discharge had worldwide effect. If the Ninth Circuit's decision is allowed to stand, Simon will never have to file a bankruptcy proceeding in Hong Kong.

The Ninth Circuit's view of the relationship between comity and international bankruptcy law is without support and directly conflicts with settled international law and United States law going back over 200 years. The long-standing rule is that a bankruptcy discharge granted in a jurisdiction other than the jurisdiction that governs the debt does not have extraterritorial effect. *See Ogden v. Saunders*, 25 U.S. 213, 255, 6 L.Ed. 606, 620, 12 Wheat. 213 (1827); DICEY & MORRIS, THE CONFLICT OF LAWS Rule 172 (12th ed. 1994).

The interplay between international law and the discharge of debts in bankruptcy was analyzed by this Court over 100 years ago in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). In *Canada Southern*, a Canadian corporation, chartered to build railways in Canada, issued certain bonds payable in New York. Facing financial difficulties, the corporation restructured the bonds in a quasi-bankruptcy proceeding in Canada. The restructuring was approved by an act of the Canadian Parliament. Dissenting bondholders then sued in New York on the bonds. The Supreme Court held, under principles of comity, that the restructuring effectuated in Canada should be given effect in the United States and rejected the lawsuit.

Canada Southern is an important case in international bankruptcy law because it established the principal that a court should consider according respect, *as a matter of comity*, to decisions of another country concerning bankruptcy. However, *Canada Southern* has never been interpreted to mean that all discharges granted outside of the United States are recognized in the United States. In order to prevent a foreign country from becoming a debtor haven that is unfair to United States creditors, United States courts often refuse to give effect to bankruptcy discharges granted in foreign nations. *See, e.g., Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985) (no evidence that liquidation proceeding in Dubai was consonant with United States law and public policy); *see also* 11 U.S.C. § 304.

The Ninth Circuit Order cannot be reconciled with *Canada Southern*. According to the logic of the Ninth Circuit, while *Canada Southern* empowers courts in the United States to make an independent determination concerning the effect in the United States of a foreign

bankruptcy discharge, foreign courts and creditors are automatically bound by bankruptcy discharges granted in the United States. To state the Ninth Circuit's argument is to refute it. The Ninth Circuit's view is the exact opposite of the principle of comity and there is simply no evidence, not to mention a clear expression, in the language of section 524(a), the legislative history of section 524(a), or anywhere else, that Congress shares this view.

Under the principles of comity recognized in *Canada Southern*, the courts in Hong Kong should be permitted to make an independent determination of the effect in Hong Kong of the bankruptcy discharge granted to Simon in the United States. Perhaps those courts will recognize the discharge and perhaps they will not. Perhaps those courts will take into consideration the participation (or lack thereof) by the creditor in the United States bankruptcy case and perhaps they will not. But it is their decision and not the decision of a United States bankruptcy court.

While the decision in this case and the decision in *Maxwell* address different underlying bankruptcy issues, the Ninth Circuit's facile dismissal of important international comity concerns is in conflict with *Maxwell*'s mandate that comity should govern transnational bankruptcy issues. While *Maxwell* is consistent with *Canada Southern*, the Ninth Circuit Order is not and can only serve to confuse lower courts that are confronted with transnational bankruptcy issues. Instruction from this Court is required to clarify whether and to what extent United States bankruptcy courts should accord respect to the sovereign right of foreign courts and countries that also have an interest in a debtor-creditor relationship.

III. THE NINTH CIRCUIT ORDER SHOULD BE REVERSED BECAUSE IT RADICALLY MISINTERPRETS THE EFFECT OF FILING A PROOF OF CLAIM UPON THE JURISDICTION AND POWER OF A BANKRUPTCY COURT

The Ninth Circuit Order should also be reversed because it radically misinterprets this Court's prior rulings with respect to the effect of the filing of a proof of claim upon the jurisdiction and power of a bankruptcy court. According to the logic of the Ninth Circuit, even if Congress did not intend that section 524(a) of the Bankruptcy Code operate extraterritorially, section 524(a) will be applied extraterritorially against a specific creditor if that creditor "fully participates" in the bankruptcy case by filing a proof of claim, even if the claim that was filed is different than the claim sought to be enforced outside of the United States.

A. While The Filing Of A Proof Of Claim Can Constitute Consent To The Jurisdiction Of The Bankruptcy Court, The Filing Of A Proof Of Claim Cannot Have The Effect Of Broadening The Substantive Power Of The Bankruptcy Court To Enforce The Discharge Injunction Extraterritorially.

The Ninth Circuit cited no precedent for its new proposition that the filing of a proof of claim can somehow

transmute a purely domestic federal statute into one with extraterritorial effect. Instead, the Ninth Circuit treated the issue as one of jurisdiction and cited an entirely different body of case law which states that a creditor who files a proof of claim submits to the "equitable jurisdiction" of the bankruptcy court to adjudicate that claim and related counterclaims and, therefore, waives its Seventh Amendment right to a jury trial with respect to certain counterclaims asserted by the bankruptcy trustee or debtor in possession. The Ninth Circuit stated that:

> When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect all or a portion of a debt, it assumes certain risks. For example, the creditor loses the right to a jury trial on any counter-claims filed by the debtor or the trustee. *See Langenkamp*, 498 U.S. at 44-45. In addition, the creditor loses previously-held rights to assert "legal claims" against the debtor and his estate; bankruptcy "converts the creditor's legal claim into an equitable claim to a pro rata share of the res." *Katchen*, 382 U.S. at 336. By acceding to bankruptcy court jurisdiction so that it might recover a portion of the money it was owed, Hong Kong forfeited any right it had to claim that the court lacked the power to enjoin Hong Kong-Shanghai from commencing a post-bankruptcy proceeding against the debtor. Clearly, Hong Kong-Shanghai's participation in the bankruptcy subjected it to the court's discharge order pursuant to 11 U.S.C. § 524. A sanction for violating that order is not an improper extraterritorial application of United

States laws.

Appendix at 11a.

With all due respect to the Ninth Circuit, the preceding paragraph reveals a fundamental misunderstanding of both bankruptcy court jurisdiction and section 524(a) of the Bankruptcy Code. Twice in the paragraph the Ninth Circuit states that Hongkong Bank subjected itself to bankruptcy court jurisdiction by filing a proof of claim. That is simply false. Hongkong Bank was subject to bankruptcy court jurisdiction regardless of whether it filed a proof of claim, because Hongkong Bank does business in and has minimum contacts with the United States. *See* Federal Rule of Bankruptcy Procedure 7004(f); *see also Goodson v. Rowland (In re Pintlar Corp.)*, 133 F.3d 1141 (9th Cir. 1998) (bankruptcy court had jurisdiction over foreign corporation because of minimum contacts with the United States).

Furthermore, the Ninth Circuit held that Hongkong Bank was bound by the discharge injunction set forth in section 524(a) because it "participated in the bankruptcy." That also is simply false. All creditors with notice of a bankruptcy case, including Hongkong Bank in this case, are bound by a discharge injunction under section 524(a) regardless of whether they filed a proof of claim or otherwise participated in the bankruptcy case. *See, e.g., Maroney v. Bowman (In re Maroney)*, 195 B.R. 452, 454 (Bankr. D. Ariz. 1996) ("The broad scope of [the discharge] makes it clear that discharge is not dependent upon scheduling of the claim, filing a proof of claim, or other affirmative act either by the creditor or the debtor.").

The fundamental error the Ninth Circuit made was that it misunderstood the consequences of filing a proof of

claim in a bankruptcy case. As bankruptcy courts are Article I courts, important Constitutional principles limit the jurisdiction of the bankruptcy courts. *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). For example, the Seventh Amendment guarantees the right of a jury trial in certain proceedings often heard by bankruptcy courts, such as fraudulent transfer actions. *See Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989). At the same time, it is unclear whether bankruptcy courts can conduct jury trials without the consent of the parties. 28 U.S.C. § 157(e) (bankruptcy court may only conduct jury trial with consent of the parties); *see also Taxel v. Electronics Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1450-51 (9th Cir. 1990) (discussion of whether jury trials may be conducted by a non-Article III court consistent with the Seventh Amendment). Therefore, in the event a creditor is sued to disgorge a fraudulent transfer in the bankruptcy court, the bankruptcy court may not have the jurisdiction to conduct the trial if a jury trial is requested by the creditor. However, if the creditor filed a proof of claim and thereby consented to the jurisdiction of the bankruptcy court to equitably adjudicate the claim, the right to a jury trial on any fraudulent transfer claim against the creditor disappears because of the equitable nature of the proceeding to allow or disallow claims. *Langenkamp v. Culp*, 498 U.S. 42, 111 S.Ct. 330, 112 L. Ed 2d 343 (1990).

Similarly, the filing of a proof of claim by a creditor may be deemed to be consent to the bankruptcy court's personal jurisdiction. *See, e.g., Tucker Plastics, Inc. v. Pay 'N Pak Stores, Inc. (In re PNP Holdings Corp.)*, 184 B.R. 805, 806-07 (Bankr. 9th Cir. 1995), *aff'd*, 99 F.3d 910 (9th Cir. 1996) (foreign creditor who filed a proof of claim consented to personal jurisdiction of bankruptcy court in preference

lawsuit). A proof of claim may also be deemed to be a consent to the bankruptcy court's jurisdiction to hear related state-law counterclaims. *See, e.g., Piombo Corporation v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986). Finally, the filing of a proof of claim by a governmental entity may be deemed to be a waiver of sovereign immunity on related counterclaims. 11 U.S.C. § 106(b).

The fundamental consequence of filing a proof of claim, and the point misunderstood by the Ninth Circuit, is that the filing of a proof of claim can constitute consent to the *jurisdiction* of the bankruptcy court, but does not broaden the *substantive* authority or power of the bankruptcy court beyond the terms of the Bankruptcy Code. Courts have repeatedly refused attempts to construe the filing of a proof of claim as a waiver of anything but the limited *jurisdictional* categories listed above. *See, e.g., Hart Ski Mfg. Co., Inc. v. Maschinenfabrik Hennecke GmbH (In re Hart Ski Mfg. Co., Inc.)*, 711 F.2d 845 (8th Cir. 1983) (litigant did not waive contractual right to arbitration by filing a proof of claim); *Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 204 (3rd Cir. 1983) ("We know of no authority supporting the proposition that the filing of a proof of claim is a waiver of the provisions of a forum selection clause."); *Sacred Heart Hospital of Norristown v. Commonwealth of Pennsylvania, Department of Public Welfare (In re Sacred Heart Hospital of Norristown)*, 204 B.R. 132, 142 (E.D. Pa. 1997), *aff'd* 133 F.2d 237 (3rd Cir. 1998) ("[A] party only submits itself to whatever *power* the bankruptcy court may have. If the bankruptcy court does not have a particular power, a litigant cannot submit itself to the 'power' by filing a proof of claim.").

More significantly, even assuming for purposes of argument that the filing of the proof of claim subjected Hongkong Bank to the "equitable jurisdiction" of the bankruptcy court, the Ninth Circuit erred in expanding the section 524(a) discharge injunction to the proposed extraterritorial conduct of Hongkong Bank based on principles of "equitable jurisdiction." As made clear by this Court, the bankruptcy court's "equitable jurisdiction" cannot be used to grant relief beyond the relief allowed by the provisions of the Bankruptcy Code itself. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 968, 99 L.Ed.2d 169 (1988) ("The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *see also Committee Of Creditors Holding Unsecured Claims v. Koch Oil Company (In re Powerine Oil Company)*, 59 F.3d 969, 973 (9th Cir. 1995) ("Equity may not be invoked to defeat clear statutory language, nor to reach results inconsistent with the statutory scheme established by the Code."); *Clark v. Balcor Real Estate Finance (In re Meridith Hoffman Partners)*, 12 F.3d 1549, 1557 (10th Cir. 1993) ("[T]he courts' equitable powers do not permit them to disregard the clear language of the statute, regardless of how unfair it may seem to be."). Therefore, since there is no expression of intent that section 524(a) be applied extraterritorially, the Ninth Court erred in its extraterritorial application of the statute based on the bankruptcy court's equitable powers and jurisdiction.

In summary, because the Ninth Circuit fundamentally misconstrued bankruptcy court jurisdiction and the effect of filing a proof of claim, it reached a result that is fundamentally at odds with the language and legislative history of section 524(a) of the Bankruptcy Code. Such a decision should not be permitted to stand.

B. The Ninth Circuit Order Should Be Reversed Because It Erroneously Held That The Filing Of A Proof Of Claim Is A Waiver Of All Jurisdictional Arguments And Defenses, Including Arguments And Defenses Relating To Claims And Counterclaims That Do Not Arise Out Of The Same Transaction And Occurrence Set Forth In The Proof Of Claim

Assuming that the filing of a proof of claim could magically transform section 524(a) of the Bankruptcy Code from a purely domestic federal statute into a statute with extraterritorial effect, Hongkong Bank nevertheless did not file a proof of claim on account of the Guarantee that it seeks to enforce in the courts of Hong Kong. The Ninth Circuit improperly dismissed out-of-hand the argument that a filing of a proof of claim only constitutes a waiver of jurisdictional arguments relating to the claim and any counterclaims arising out of the same transaction and occurrence as set forth in the proof of claim. Appendix at 10a.

In fact, Congress has addressed this very issue in an analogous circumstance. As set forth above, the filing of a proof of claim by a governmental unit will be deemed to be a waiver of its sovereign immunity from suit in the bankruptcy court. The waiver is codified in section 106(b) of the Bankruptcy Code:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived

> sovereign immunity with respect to a claim against such governmental unit that is property of the estate and *arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.*

(emphasis added). *See generally United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (discussion of waiver of sovereign immunity under prior version of 11 U.S.C. § 106).

Consistent with Hongkong Bank's arguments to the Ninth Circuit with respect to section 524(a), every court that has addressed the issue of the scope of the waiver under section 106(b) has determined, based on the statutory language, that the waiver is limited to claims that arise out of the same transaction or occurrence set forth in the proof of claim. *See, e.g., Schlossberg v. State of Maryland Comptroller of the Treasury (In re Creative Goldsmiths of Washington D.C., Inc.)*, 119 F.3d 1140, 1149 (4th Cir. 1997).

Similarly, as set forth above, a proof of claim may also be deemed to be a consent to the bankruptcy court's jurisdiction to hear state-law counterclaims. However, the proof of claim is only deemed to be a submission to the jurisdiction of the bankruptcy court with respect to counterclaims that are related to the claim and is not deemed to be a general waiver of all jurisdictional arguments and defenses with respect to unrelated claims. *See, e.g., Piombo Corporation v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159, 162-63 (9th Cir. 1986).

The Ninth Circuit Order cannot be reconciled with the case law that discusses the effects of the filing of a proof of claim. The absolute lack of supporting authority (and

overwhelming opposing authority on analogous issues) demonstrates that the Ninth Circuit was determined to make a policy choice, notwithstanding the absence of support in the statute or the case law. As set forth above, the question of whether or not section 524(a) of the Bankruptcy Code should be given extraterritorial effect to make the United States an international debtor-haven should be made by Congress and not the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 24, 1998

(Any footnotes trail at end of each document)

153 F.3d 991
33 Bankr.Ct.Dec. 141, Bankr. L. Rep. P 77,783, 98 Cal. Daily Op. Serv. 6641, 98 Daily Journal D.A.R. 9261
(Cite as: 153 F.3d 991)

In re William Neil SIMON, Debtor.
HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff-Appellant,
v.
William Neil SIMON, Defendant-Appellee.

No. 96-16859.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 8, 1998.

Decided Aug. 27, 1998.

Howard J. Weg, Orrick, Herrington & Sutcliffe, Los Angeles, CA, for plaintiff-appellant.

Michael D. Cooper, Wendel, Rosen, Black & Dean, Oakland, CA, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Claudia Wilken, District Judge, Presiding.

D.C. No. CV-95-02211-CW.

Before: HALL and THOMAS, Circuit Judges, and WHALEY, [FN1] District Judge.

Opinion by Judge THOMAS; Partial Concurrence and Partial Dissent by Judge HALL.

THOMAS, Circuit Judge:

This appeal concerns whether a foreign creditor is subject to bankruptcy court sanctions for pursuing foreign collection of a debt discharged in a domestic bankruptcy in which the foreign creditor participated. We conclude that a bankruptcy court may sanction the foreign creditor for violating a court injunction, and affirm the district and bankruptcy courts.

I

The money trail which forms the basis for this dispute began when Hong Kong and Shanghai Banking Corp., Ltd. ("Hong Kong-Shanghai") extended a loan ("Loan") for over $24 million to Odyssey International Holdings, Ltd. ("Odyssey"). Hong Kong-Shanghai is an international banking company incorporated in Hong Kong, which has offices in San Francisco and New York, and frequently does business in the United States. Odyssey is an international company incorporated in the British Virgin Islands, and maintaining offices in Hong Kong. William Neil Simon ("Simon"), Odyssey's major shareholder, personally guaranteed the Loan. Paragraph 15 of Simon's guarantee provides:

> This guarantee and all rights, obligations and liabilities arising hereunder shall be construed and determined under and may be enforced in accordance with the laws of Hong Kong. I hereby agree that the Courts in Hong Kong shall have jurisdiction over all disputes arising

> under the guarantee and irrevocably appoint Denton Hall Burgin & Warrens of 1001 Hutchinson House, Hong Kong to be my agent for the purpose of accepting service of process hereunder.

When he executed the guarantee, Simon lived in and operated his company from Hong Kong. Under the guarantee agreement, Simon was to satisfy the Loan in full within one year. Instead, facing personal debts of over $200 million, he traveled to the United States and filed a personal bankruptcy under Chapter 7 of the United States Bankruptcy Code.

In his bankruptcy schedules, Simon listed the guarantee to Hong Kong-Shanghai on account of the Loan as an obligation or liability. Hong Kong-Shanghai filed a proof of claim in the bankruptcy court in the amount of more than $37 million, which accounted for its share in a separate, $200 million syndicate bank loan. Hong Kong-Shanghai did not file a proof of claim for Simon's guarantee of the Loan, nor did it object to the discharge of his debts. The bankruptcy court entered an order granting Simon a discharge of all debts on January 29, 1995. As part of its order, the bankruptcy court issued the following injunction:

> All creditors whose debts are discharged by this order ... are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

This injunction was issued pursuant to 11 U.S.C. § 524(a)(2), which provides:

> (a) A discharge in a case under this title-
> ....
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as personal liability of the debtor, whether or not discharge of such debt is waived....

On February 6, 1995, Hong Kong-Shanghai filed a "Complaint for Declaratory Judgment Regarding the Debtor's Discharge" in bankruptcy court. Essentially, Hong Kong-Shanghai sought a declaratory judgment pursuant to 28 U.S.C. § 2201(a) from the bankruptcy court that, while Simon's discharge and the injunction against Hong Kong-Shanghai were effective within the United States, the discharge and injunction were not enforceable outside the United States. Hong Kong-Shanghai requested the bankruptcy court to issue an order containing any one of three findings: (1) that the discharge did not apply to enjoin Hong Kong-Shanghai from enforcing the Simon guarantee in Hong Kong; (2) that if the discharge so provided, it be modified to permit prosecution of the guarantee in Hong Kong; or (3) if Hong Kong-Shanghai chose to commence collection proceedings in Hong Kong, it would not be subject to sanctions in the United States.

Following a hearing, the bankruptcy court granted Simon's motion to dismiss for failure to state a claim upon which relief may be granted. The bankruptcy court noted that, although the discharge injunction was not directly

enforceable in Hong Kong, it was enforceable in United States district court via the imposition of sanctions against Hong Kong-Shanghai followed by appropriate collection proceedings against Hong Kong-Shanghai's property located in the United States. Moreover, the bankruptcy court found that such enforcement did not contemplate the extraterritorial application of a United States statute. Finally, the court refused to modify the discharge injunction, holding that there was no legal basis for modifying an injunction where it was appropriate and fully supported by bankruptcy law.

Hong Kong-Shanghai appealed the bankruptcy court's order to the United States District Court for the Northern District of California. The district court issued a ruling affirming the bankruptcy court's conclusion that the injunction was not an extraterritorial application of a United States statute. The district court concluded that: (1) the Bankruptcy Code conferred *in rem* jurisdiction to the court over all the property making up the debtor's estate, thus "it cannot be said that enjoining actions, wherever they may be instituted, so as to preserve the court's exclusive *in rem* jurisdiction is an extraterritorial application of the Court's equitable powers;" and (2) because Hong Kong-Shanghai had submitted to the equity jurisdiction of the bankruptcy court by participating in the bankruptcy, the court was not acting extraterritorially in issuing the injunction. Hong Kong-Shanghai appeals the district court's order, primarily arguing that the section 524 discharge injunction constitutes an improper extraterritorial application of a statute.

II

Congress has the unquestioned authority to enforce its laws beyond the territorial boundaries of the United States. *E.E.O.C. v. Arabian-American Oil Co.*, 499 U.S. 244, 248,

111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("*Aramco* "). Whether Congress has exercised that authority in a particular case is a matter of statutory construction. *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir.1970)(en banc). In construing a statute to ascertain Congress' territorial intent, we begin with the presumption that "the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). With that presumption in mind, we analyze intent by first examining the language of the act for indications of intent regarding extraterritorial application. *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227. In addition to the plain statutory words, intent may be discerned with reference to similarly-phrased legislation, *id.* at 250-51, 111 S.Ct. 1227, or the overall statutory scheme. *Foley Bros*, 336 U.S. at 286, 69 S.Ct. 575. If these inquires are inconclusive, examination of legislative history is appropriate. *Id.* Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Id.* at 286-88, 69 S.Ct. 575.

If Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case. First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir.1993) (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 319 (1952)). Second, the presumption against extraterritoriality is not applicable when the regulated conduct is "intended to,

and results in, substantial effects within the United States" *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir.1984).

Applying this analysis to the instant case, the district court was entirely correct in upholding the bankruptcy court's order and giving effect to the section 524 discharge injunction.

A

The district court properly concluded that as to actions against the bankruptcy estate, Congress clearly intended extraterritorial application of the Bankruptcy Code. The filing of a bankruptcy petition under 11 U.S.C. § § 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). With certain exceptions, the estate is comprised of the debtor's legal or equitable interests in property "*wherever located and by whomever held.*" *Id.* (emphasis supplied). The district court in which the bankruptcy case is commenced obtains exclusive *in rem* jurisdiction over all of the property in the estate. 28 U.S.C. § 1334(e); *Commodity Futures Trading Comm'n v. Co. Petro Marketing Group, Inc.*, 700 F.2d 1279, 1282 (9th Cir.1983) (interpreting 28 U.S.C. § 1471, the statutory precursor to 28 U.S.C. § 1334(e)). The court's exercise of "custody" over the debtor's property, via its exercise of *in rem* jurisdiction, essentially creates a fiction that the property-regardless of actual location-is *legally* located within the jurisdictional boundaries of the district in which the court sits. See *Katchen v. Landy*, 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (noting that bankruptcy courts have "constructive possession" over estate property) (internal quotation marks and citations omitted); *Commodity Futures*, 700 F.2d at 1282 (noting that under the bankruptcy code, "all property of the debtor, wherever located, is in *custodia legis* of the bankruptcy court."). This includes

property outside the territorial jurisdiction of the United States. *See Stegeman*, 425 F.2d at 986 (construing extraterritorial jurisdictional reach of prior Bankruptcy Act); see also *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996).

Given this clear expression of intent by Congress in the express language of the Bankruptcy Code, we conclude that Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate. Although Hong Kong-Shanghai concedes this point, it questions whether such an extraterritorial application may operate to enjoin a foreign proceeding. As a matter of general principle, protection of *in rem* or *quasi in rem* jurisdiction is a sufficient basis for a court to restrain another court's proceedings. *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). In such cases, "the state or federal court having custody of such property has exclusive jurisdiction to proceed." *Id.* This rationale extends to foreign proceedings. *See Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852, 855 (9th Cir.1981); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir.1992); *China Trade & Develop. Corp., v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir.1987).

In the bankruptcy context, the Seventh Circuit has expressly held that protection of the bankruptcy court's *in rem* jurisdiction over estate property allows an international proceeding to be enjoined pursuant to the automatic stay in 11 U.S.C. § 362. *Underwood*, 98 F.3d at 961. As Chief Judge Posner explained: "The efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located...." *Id.*

As applied to the concept of *in rem* bankruptcy jurisdiction, there is no functional difference between the automatic stay imposed by 11 U.S.C. § 362 upon the commencement of a bankruptcy and the injunction prohibiting collection actions against the bankruptcy estate provided in 11 U.S.C. § 524(a)(3). Each stay operates to protect the estate and the *in rem* jurisdiction of the bankruptcy court. Accordingly, we join the Seventh Circuit's logic and hold that a bankruptcy court may validly exercise its *in rem* jurisdiction to protect estate property wherever the property is located in issuing a discharge injunction under 11 U.S.C. § 524. Thus, the district court correctly held in this case that the 11 U.S.C. § 524 discharge enjoined Hong Kong-Shanghai from commencing collection against any bankruptcy estate property regardless of its geographic location.

B

The more difficult problem is whether a bankruptcy court may enjoin a foreign collection action against the debtor personally, or as to assets which do not form part of estate property, if the creditor was not a party to the United States bankruptcy proceedings. However, we need not squarely address that question because Hong Kong-Shanghai fully participated in the Simon bankruptcy, thus surrendering to United States jurisdiction. Because allowing a participating creditor to disregard bankruptcy court orders would have "substantial effects within the United States," see *Laker Airways*, 731 F.2d at 925, the presumption against extraterritorial effect of a statute does not apply. Thus, the section 524 discharge injunction does not restrain the courts in Hong Kong; it enjoins the creditor. Hong Kong-Shanghai may choose to commence collection proceedings in Hong Kong against Simon, but it does so at the risk of bankruptcy court sanctions in the United States.

Hong Kong-Shanghai disputes that its submission of a proof of claim should have any effect because the proof of claim was unrelated to the Loan, or Simon's guarantee of it. In essence, Hong Kong-Shanghai is contending it was submitting itself to limited bankruptcy court jurisdiction confined to the parameters of its proof of claim. This argument misapprehends bankruptcy law and the effect of the proceedings in this case. The Bankruptcy Code does, in fact, allow for limited appearances by foreign representatives, but only under narrowly circumscribed conditions inapplicable to this case. 11 U.S.C. § 306 allows a trustee, administrator or other representative of an estate in a foreign insolvency proceeding to make limited appearance to assert rights in connection with the foreign proceeding. 2 *Collier on Bankruptcy* ¶ 306.02, p. 306-2 (15th ed. 1998). A creditor asserting its own rights does not qualify as a "foreign representative" entitled to make a limited appearance. 11 U.S.C. § 101(24). Further, as the district court noted, *Langenkamp v. Culp*, 498 U.S. 42, 44-45, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990), suggests that filing a proof of claim on any debt is sufficient to subject a creditor to the general jurisdiction of the bankruptcy court.

Hong Kong-Shanghai had a number of other opportunities to assert its position in bankruptcy court, but neglected to do so. It did not request the bankruptcy court for abstention based on the possible pendency of foreign proceedings pursuant to 11 U.S.C. § 305. No request was made by Hong Kong-Shanghai under 11 U.S.C. § 362(d) to modify or lift the automatic stay enjoining it from collection proceedings against the debtor. Hong Kong-Shanghai did not make an adequate protection request under 11 U.S.C. § 361. The debtor listed his guarantee of the Loan on his bankruptcy schedules without objection by Hong Kong-Shanghai. Hong

Kong-Shanghai failed to file any objection to the discharge of Simon's debts pursuant to 11 U.S.C. § 727(c). The only action Hong Kong-Shanghai took was to assert its rights in a collateral proceeding so that it might be paid a distribution out of the bankruptcy estate.

When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect all or a portion of a debt, it assumes certain risks. For example, the creditor loses the right to a jury trial on any counter-claims filed by the debtor or the trustee. *See Langenkamp*, 498 U.S. at 44-45, 111 S.Ct. 330. In addition, the creditor loses previously-held rights to assert "legal claims" against the debtor and his estate; bankruptcy "converts the creditor's legal claim into an equitable claim to a pro rata share of the res." *Katchen*, 382 U.S. at 336, 86 S.Ct. 467. By acceding to bankruptcy court jurisdiction so that it might recover a portion of the money it was owed, Hong Kong-Shanghai forfeited any right it had to claim that the court lacked the power to enjoin Hong Kong-Shanghai from commencing a post- bankruptcy collection proceeding against the debtor. Clearly, Hong Kong-Shanghai's participation in the bankruptcy subjected it to the court's discharge order pursuant to 11 U.S.C. § 524. A sanction for violating that order is not an improper extraterritorial application of United States laws. Having decided that the district court properly upheld the bankruptcy court order on this basis, we need not decide whether 11 U.S.C. § 524 itself applies extraterritorially in all cases, either as to non-estate assets, or the debtor's personal liability.

III

International comity does not require us to vacate the bankruptcy court's injunction forfending debt collection proceedings against Simon based on pre-petition debt, as

Hong Kong-Shanghai alternatively suggests. Generally, the doctrine of comity stands for the proposition that a statute "ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 118, 2 L.Ed. 208 (1804). *See also* Restatement (Third) of Foreign Relations, § 403(1) (1986)(providing that states normally refrain from prescribing laws that govern activities connected with another state "when the exercise of such jurisdiction is unreasonable."). In the legal sense, comity:

> is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

Hong Kong-Shanghai argues that these principles require deference to the courts of Hong Kong, and permission for Hong Kong-Shanghai to commence collection proceedings against Simon. For this proposition, Hong Kong-Shanghai primarily relies on *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1050 (2d Cir.1996) ("*Maxwell* "), in which the Second Circuit held, under the facts of that case, that the principles of international comity counseled against applying the

Bankruptcy Code's preference avoidance provision internationally. However, the concerns which underlay the *Maxwell* court's concerns are not present in this litigation, and the philosophy of *Maxwell* is entirely consistent with the order issued in this case.

International comity in transnational insolvency proceedings must be considered in the context of bankruptcy theory. Hong Kong-Shanghai argues that the structure of the Bankruptcy Code supports the "territorial" theory of international bankruptcy law, sometimes affectionately known as the "grab" rule. See Jay Lawrence Westbrook, *The Lessons of Maxwell Communications*, 64 Fordham L.Rev. 2531, 2532 (1996). Under this philosophy, courts in each national jurisdiction are responsible for seizing and controlling assets within their geographic reach. Simon contends that the Code embraces the "universalist" philosophy which contemplates one plenary transnational proceeding completely governing the administration of assets world-wide.

The Bankruptcy Code does not codify either of the theories proffered by the parties. Rather, the Code provides for a flexible approach to international insolvencies dependent upon the circumstances of the particular case. If any philosophy can be attributed to the structure of the Code it is that of deference to the country where the primary insolvency proceeding is located, including the United States if the plenary proceeding is located here, and flexible cooperation in administration of assets. For example, 11 U.S.C. § 304(a) provides for the filing of proceedings in the United States which are ancillary to plenary foreign proceedings. 11 U.S.C. § 305 allows a United States bankruptcy court to dismiss or suspend a domestic bankruptcy proceeding when there is a pending foreign

proceeding, and the foreign representative seeks dismissal or suspension of proceedings in the United States. A "foreign proceeding" is defined as:

> a proceeding, whether judicial or administrative, and not necessarily subject to the bankruptcy law, if any, in a foreign country in which the debtor's domicile, residence, principal place of business or principal assets were located at the commencement of the proceeding, but which is convened for the purpose of liquidation or debt adjustment by composition, extension, discharge or reorganization.

11 U.S.C. § 101(23).

On the other hand, as we have discussed, Congress extended the bankruptcy court's power over the debtor's legal and equitable interests in property "wherever located." 11 U.S.C. § 541. Additionally, subject to the usual threshold Code requirements, a foreign entity owning business property in the United States may file a plenary proceeding here. 11 U.S.C. § 109(a); *Maxwell*, 93 F.3d at 1046.

Thus, under the Bankruptcy Code, the bankruptcy court must consider the status and progress of other nations' insolvency proceedings in determining how to manage domestic bankruptcies. In most cases, the court will defer to where the "center of gravity" of multiple proceedings exists, if one can be ascertained. However, courts may also proceed jointly with a foreign court, *see Maxwell*, 93 F.3d at 1041-42, or may choose to exercise its power to the full extent of its jurisdiction in an appropriate case.

Given this general background, the *Maxwell* court's conclusion was completely logical. *Maxwell* involved an international insolvency jointly managed in the United States and Great Britain. A true conflict existed between the preference law of Great Britain and the United States which would have produced a different result depending on which law applied. Because the pre-petition transactions occurred solely in Great Britain, the *Maxwell* court appropriately exercised its discretion to defer in the interest of international comity.

By contrast, this case does not involve competing bankruptcy proceedings; indeed, there is no proceeding pending in Hong Kong. The sole, plenary insolvency proceeding was initiated in the United States without objection and with the participation of the appellant. Hong Kong-Shanghai cannot point to a single conflict which exists between Hong Kong and United States law on the issue in question. In fact, the section 524 discharge injunction does not apply to the Hong Kong courts at all, but only to the creditor who enjoyed the benefits of participating in the United States bankruptcy. Under these circumstances, international comity does not dictate a result contrary to that reached by the district and bankruptcy courts. Rather, it is consistent with the general principles of international comity which is limited to cases in which " 'there is in fact a true conflict between domestic and foreign law.' " *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (citing *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) (Blackmun, J., concurring)). Thus, the district court

properly declined to reverse the bankruptcy court's order on the basis of international comity.

IV

The district court was entirely correct in its analysis of the bankruptcy court order. The order did not involve an improper extraterritorial application of a statute as applied to estate property because 11 U.S.C. § 541 expressly includes all of the debtor's property regardless of geographic location. The discharge injunction was validly applied to Hong Kong-Shanghai as to the debtor's non-estate property because Hong Kong-Shanghai's participation in the Simon bankruptcy subjected it to the otherwise valid orders of the bankruptcy court. International comity does not compel a contrary result because there is no conflicting proceeding in a foreign nation at issue. For these reasons, we affirm the judgment of the district court.

AFFIRMED.

CYNTHIA HOLCOMB HALL, Circuit Judge, concurring in part and dissenting in part, and concurring in the judgment.

I concur in the majority opinion, though I write separately to express my disagreement with the majority on the issue of Congressional intent. The majority concludes that Congress clearly intended the extraterritorial application of the Bankruptcy Code as it applies to the property of the estate. The majority bases this conclusion on a single vague specification in 11 U.S.C. § 541(a) that the estate is comprised of the debtor's legal or equitable interests in property "wherever located and by whomever held." While this language may plausibly apply to property located within foreign jurisdictions, we do not simply apply statutes extraterritorially if it is plausible or even desirable to do so.

We must "assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *E.E.O.C. v. Arabian-American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). As the Supreme Court has pointed out, "[i]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." *Id.* at 253, 111 S.Ct. 1227.

However, I concur in the judgment because I do not believe that extraterritoriality is implicated in this case. As the majority itself points out: "[t]he court's exercise of 'custody' over the debtor's property, via its exercise of *in rem* jurisdiction, essentially creates a fiction that the property-regardless of actual location-is *legally* located within the jurisdictional boundaries of the district in which the court sits." The majority further recognizes that this "legal fiction" applies even to property located outside the territorial jurisdiction of the United States. While the majority collapses its discussion of this "legal fiction" into its discussion of Congressional intent, these are in fact two wholly independent bases for the district court's exercise of power.

Congressional intent may be less than clear, but it is clear that bankruptcy estate property is located within the bankruptcy court's jurisdiction. *See Katchen v. Landy*, 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); *Commodity Futures Trading Comm'n v. Co Petro Marketing Group, Inc.*, 700 F.2d 1279, 1282 (9th Cir.1983). I concur in the judgment for this reason.

Footnote

1 Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Filed 11/9/98

In re William Neil SIMON, Debtor.

HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff-Appellant,

v.

William Neil SIMON, Defendant-Appellee.

No. 96-16859.

D.C. No. CV-95-02211- CW.

Before: HALL and THOMAS, Circuit Judges, and WHALEY, [FN1] District Judge.

The Motion of Hongkong and Shanghai Banking Corporation Limited to amend opinion is hereby DENIED.

Footnote

1 Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Filed 8/22/96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re: William Neil SIMON, Debtor.

HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff,

v.

William Neil SIMON, Defendant

No. C 95-02211 CW
(Bankruptcy No. 94-46497 NT)
(Adversary No. 95-4314 AN)

ORDER AFFIRMING JUDGMENT
OF BANKRUPTCY COURT

Plaintiff The Hongkong and Shanghai Banking Corporation Limited ("HKSB') appeals the bankruptcy court's judgment granting Defendant and Debtor William Neil Simon's motion to dismiss HKSB's adversary proceeding for failure to state a claim. This appeal presents the question of whether a bankruptcy court in the United States may enjoin a creditor who participated in a United States bankruptcy proceeding from bringing an action in a court of a foreign country against property of the debtor or the debtor's bankruptcy estate. HKSB's appeal came regularly on for hearing on December 1, 1995. Having considered all of the papers filed by the parties and oral argument, the Court AFFIRMS the ruling of the bankruptcy court.

BACKGROUND

In September, 1994, Mr. Simon filed a Chapter 7 bankruptcy case in this district. In January, 1995, the bankruptcy court entered an order granting Mr. Simon a discharge under 11 U.S.C. §§ 524 (a) and 727(a). HKSB did not file a proof of claim in the chapter 7 case regarding Mr. Simon's personal guarantee of his company's $24 million debt to HKSB. HKSB did, however, file a proof of claim regarding Mr. Simon's personal guarantee of HKSB's share of over $200 million in other borrowings that were loaned by a syndicate of banks to several companies with which Mr. Simon was involved.

In February, 1995, HKSB filed the adversary proceeding that is the subject of this appeal. HKSB sought a declaratory judgment stating that HKSB would not violate the statutory injunction of § 524(a) against the enforcement of discharged pre-bankruptcy claims by bringing a post-bankruptcy action in the courts of Hong Kong to enforce Mr. Simon's $24 million personal guarantee. The complaint also sought a declaration that HKSB's proposed action would not subject HKSB to claims for contempt, damages, and penalties in the bankruptcy court. HKSB argued that this relief was warranted because § 524(a) gives no indication that it is meant to apply outside of the territorial jurisdiction of the United States. HKSB argued that because § 524(a) gives no such indication, under the presumption against the extraterritorial operation of federal statutes established by *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) ("*Aramco*"), § 524(a) does not enjoin the filing of proceedings against the Simon bankruptcy estate in foreign countries. Mr. Simon, maintains, and the bankruptcy court held, however, that application of § 524(a) to HKSB's proposed action in the Hong Kong courts does not involve

an extraterritorial application of United States law. Based on this holding, the bankruptcy court granted Mr. Simon's motion to dismiss for failure to state a claim and dismissed HKSB's complaint. HKSB timely appealed to this Court.

DISCUSSION

I. Standard of Review

The bankruptcy court's decision to dismiss HKSB's complaint for failure to state a claim is subject to *de novo* review. *Oscar v. University Students Co-Op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 655 (1992).

II. Merits

A. The Presumption Against Extraterritoriality

In *Aramco*, the Supreme Court held that unless a contrary intent appears, the legislation of Congress is meant to apply only within the territorial jurisdiction of the United States. 499 U.S. at 248 (citing *Foley Bros., Inc. v Filardo*, 336 U.S. 281, 285 (1949)). The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). Moreover, the presumption recognizes that Congress is primarily concerned with domestic conditions when it legislates. *Aramco*, 499 U.S. at 243 (citing *Foley Bros.*, 336 U.S. at 285).

In *Maxwell Communications Corp. PLC v. Barclays Bank PLC*, 186 B.R. 807 (S.D.N.Y. 1995), a district court recently found that a two-fold inquiry is required when

attempting to apply the presumption against extraterritoriality in a specific factual setting. First, a court must determine if the presumption applies at all by determining if the regulated conduct occurred outside the nation's borders. *Id.* at 815-16 (citing *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 70-75 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1092 (1995), *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538-39 (9th Cir. 1994), and *Environmental Defense Fund. Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)). Second, if the regulated conduct did occur outside the country, then the court must inquire whether Congress intended the relevant statute to operate extraterritorially. *Id.* at 816 (citing *Kollias*, 29 F.3d at 72; *Gushi Bros.*, 28 F.3d at 1542-43).

B. The Property Involved in this Case

HKSB seeks the court's blessing to pursue legal action against Mr. Simon in Hong Kong so that it may seek to execute on property Mr. Simon may hold in Hong Kong in satisfaction of his personal guarantee of his company's debt to HKSB. While Mr. Simon apparently claims that he has no property in Hong Kong at present, *see. e.g.*, Opening Br. at 11, this case potentially involves two different types of property. The first is property that is properly part of the bankruptcy estate under 11 U.S.C. § 541. Generally speaking, this is property in which Mr. Simon held a legal or equitable interest as of the commencement of the bankruptcy proceeding and property that the estate acquired thereafter. The second type of property is property outside of the bankruptcy estate.[1] Section 541(b) lists several types of property explicitly excluded from the scope of the estate which can generally be considered part of Mr. Simon's "fresh start." Because these two types of property raise different issues with regard to the presumption against

extraterritoriality, the Court will address them separately.

C. Property Within the Bankruptcy Estate

Once a bankruptcy proceeding is filed, the district court has exclusive jurisdiction over all the property of the debtor as of the commencement of the case and over the property of the estate, wherever such property may be located. 28 U.S.C. § 1334(e) (formerly § 1334(d), redesignated in 1994); *see Board of Governors of the Fed. Reserve Sys. of the United States v. Mcorp Fin., Inc.*, 502 U.S. 32 (1991); *see also* 11 U.S.C. § 541(a) (commencement of bankruptcy case creates an estate that comprises all of debtor's legal or equitable interests in property wherever located and by whomever held save for certain listed exceptions). The language of 11 U.S.C. § 541(a) can be traced to § 70a of the Bankruptcy Act of 1898, 11 U.S.C. former § 110(a) (repealed 1979). According to the legislative history of § 70a, Congress intended this reference to property "wherever located" to "make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States." H.R. Rep. No. 2320, 82nd Cong., 2d Sess. 15, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1960, 1976. HKSB concedes that Congress intended the language of 28 U.S.C. § 1334(e) to grant the district courts extraterritorial *in rem* jurisdiction over the property covered by § 541(a). *See* Opening Br. at 24.

In interpreting 28 U.S.C. former § 1471(e) (repealed 1984), the predecessor of § 1334(e), the Ninth Circuit noted that the Statute places the property of the debtor in *custodia legis* of the court. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1282 (9th Cir. 1983).[2] Thus, while all of the property of the estate may not have been physically brought into this district, nor seized by

the court, the legal situs of the property of the estate is here. As the court in *United States v. Premises Known as Lots 50 & 51*, 681 F. Supp. 309, 312 (E.D.N.C. 1988), observed, "'it is Congress and not tradition, which decides whether "before the court" means within the district or within the nation.'" *Id.* (quoting *United States v. One 1974 Cessna Model 310R Aircraft*, 432 F. Supp. 364 (D.S.C.1977)). In this case, Congress has said it means within the world.

In light of the legal fiction that the estate's property exists within the Court's territorial jurisdiction, it cannot be said that enjoining actions, wherever they may be instituted, so as to preserve the Court's exclusive *in rem* jurisdiction is an extraterritorial application of the Court's equitable powers. *See In re McLean Indus., Inc.*, 68 B.R. 690, 694-95 (1986) (Bankr; S.D.N.Y. 1986); *In re McLean Indus., Inc.*, 76 B.R. 291, 296 (Bankr. S.D.N.Y. 1987). The Ninth Circuit has held that a court may enjoin foreign litigation when it would threaten the issuing court's *in rem* jurisdiction. *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) (citing *In re Unterweser Reederei Gmbh*, 428 F.2d 888 (5th Cir. 1970), *rev'd on other grounds*, 407 U.S. 1 (1972)), *cert. denied*, 457 U.S. 1105 (1982); *see also China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987). Since *Aramco* was handed down, both this Court and the Sixth Circuit similarly have noted that guarding against threats to a court's *in rem* jurisdiction is a valid basis for enjoining foreign proceedings, neither court discussing the *Aramco* presumption. *Robinson v. Jardine Ins. Brokers Int'l Ltd.*, 856 F. Supp. 554, 560 (N.D. Cal. 1994); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1356 (6th Cir. 1992).

Accordingly, this Court has the authority to enjoin any foreign proceedings HKSB might institute directed at property of the bankruptcy estate. Moreover, even if an

injunction against seeking to execute on bankruptcy estate property held outside the United States were considered to be regulating extraterritorial conduct, the Court finds that Congress intended the courts to protect the jurisdiction it was granting them in § 541.

HKSB cites two cases, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Stevens, J., concurring) and *United States v. Javino*, 960 F.2d 1137, 1143 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 477 (1992), for the proposition that where Congress expresses an intent that one section of a statute apply extraterritorially, it will be assumed that the other sections do not, but these cases do not support such a sweeping proposition and are not to persuasive in this case.

In its papers, HKSB places its principal reliance on *Maxwell Communications Corp. PLC v. Barclays Bank PLC*, 186 B.R. 807 (S.D.N.Y. 1995), to support its argument that the presumption against the extraterritorial operation of federal statutes created by *Aramco* deprives the district courts of the power to protect their *in rem* jurisdiction over the property of bankruptcy estates. *Maxwell* does not support this argument.

Maxwell involved an attempt by a debtor and an examiner appointed by the bankruptcy court to avoid and recover certain transfers made by the debtor within ninety days prior to the commencement of the debtor's Chapter 11 case. This attempt was made pursuant to 11 U.S.C. § 547 which allows a bankruptcy trustee to avoid such transfers. The bankruptcy court found for the defendant banks (which were the recipients of the transfers), ruling that to find for the debtor the court would have to apply § 547 extraterritorially and that there was no clear

congressional intent to support such an extension of the statute. The district court affirmed on the same basis. 186 B.R. at 812.

Because *Maxwell* involved pre-petition transfers, it involved property in which the debtor held no legal or equitable interest at the time of the commencement of the action and which therefore was not part of the bankruptcy estate. The property therefore was not under the court's extraterritorial *in rem* jurisdiction pursuant to § 541 and 28 U.S.C. § 1334(e). Indeed, what was disputed in the case was whether the court could properly bring the disputed property into the estate through an application of § 547. The bankruptcy court therefore properly considered whether § 547 applied extraterritorially and did not concern itself with Congress' intent that § 541 apply beyond the a nation's borders. *See* 186 B.R. at 819-20.

A different situation is presented by this case. To the extent that HKSB intends to use process in Hong Kong to pursue property that is part of the Simon bankruptcy estate, it will be seeking to undermine the court's exclusive jurisdiction over that property. The court may properly act to preserve its jurisdiction through an injunction against HKSB.

At oral argument, HKSB argued principally that interpreting the § 524 injunction to apply to property held beyond our nation's borders would be inconsistent with other provisions of the Bankruptcy Code, focusing in particular on §§ 508 and 304. Generally speaking, § 508 provides that a creditor who has received payment in a foreign proceeding for a claim allowable under Title 11 may not receive payment for that claim in a United States proceeding until the creditor has shared the consideration it received in the foreign proceeding with the creditors participating in the United

States proceeding. 11 U.S.C. § 508(a). Section 304 provides that where a foreign bankruptcy case is pending and the debtor has assets in this country, the foreign representative may file a petition, which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or to obtain other appropriate relief. 11 U.S.C. § 304. HKSB asserts that these sections demonstrate that a creditor can concurrently maintain a claim in a bankruptcy proceeding in a foreign country and a claim in the United States. Therefore, HKSB argues, these sections stand for the general principle that a bankruptcy discharge in one country does not enjoin a creditor from pursuing a claim in another country. HKSB maintains that this is the case even where the creditor is seeking recovery on the same claim in the two proceedings.

The Court is not persuaded by this argument in the context of property within a bankruptcy estate. The Bankruptcy Code's provision in § 541 that all of the debtor's property is part of the *res* before the court is not inconsistent with its provision in § 508 that a creditor whose claim has been satisfied in a foreign proceeding by the payment of assets that are part of that *res* must share that consideration with other creditors under the jurisdiction of the United States court before it is entitled to the benefits of proceeding in this country. The two principles are in fact complementary because § 508 encourages the restoration of the property to the distribution pool so that creditors may be treated equally. Nor does § 304 support HKSB's argument. A § 304 proceeding is an ancillary proceeding that does not create a bankruptcy estate under § 541. *See* 11 U.S.C. § 541(a) ("The commencement of a case under section 301, 302, or 303 of this title creates an estate"); *In re Rubin*, 160 B.R. 269, 274 n.3 (Bankr. S.D.N.Y. 1993) (no bankruptcy estate created under § 304).

D. Property Outside the Bankruptcy Estate

HKSB seeks to use Hong Kong process to execute on property outside of the bankruptcy estate, that is, any of Mr. Simon's post-petition Hong Kong property. Such an action would not challenge the Court's exclusive *in rem* jurisdiction created by §§ 1334(e) and 541. The issue presented by this part of the appeal is whether the injunction contained in § 524 was meant to discharge the debts Mr. Simon owes to the creditors who participated in the United States bankruptcy world-wide or only within the United States.

Maxwell is more instructive on this issue. In considering whether the transfers by the debtor to the banks were extraterritorial conduct, the district court considered the location of the transfers as well as the component events of those transactions. 186 B.R. at 816-18 (citing *Gushi Bros.*, 28 F.3d at 1538-39). The district court found that the transfers had occurred overseas because virtually every aspect of the relationship between the debtor and the banks was centered in England. The only possible connection to the United States was that the source of funds for the transfers was the sale of assets located in the United States. The district court found, however, that the sale of the assets was but a preparatory step to the transfers, and thus not sufficient to confer jurisdiction. *Id.* at 817 (citing *Gushi Bros.*, 28 F.3d at 1538).

The district court also considered whether the participation of the banks in the bankruptcy proceedings could be considered the relevant conduct for purposes of the extraterritoriality analysis. *Id.* While noting that a claimant who files a proof of claim subjects itself to the equity jurisdiction of the bankruptcy court, *Id.* (citing *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990)); *see also Granfinanciera. S.A., v.*

Nordberg, 492 U.S. 33, 58-59(1989), the district court found that the banks were not subject to the equitable jurisdiction of the United States bankruptcy court because they had limited their involvement to a coordinated proceeding in the United Kingdom, and had taken no action to give the United States bankruptcy court equitable jurisdiction over them. Based on these findings, the district court concluded that the relevant conduct was the transfers themselves and that the transfers were clearly foreign. The presumption against extraterritoriality therefore applied.

HKSB is correct that virtually every fact concerning Mr. Simon's assumption of the debt at issue here suggests that it took place overseas. Unlike the statute at issue in *Maxwell*, however, the automatic injunction of § 524 does not regulate a debtor's prepetition conduct, but rather proscribes future conduct by a creditor that participated in the bankruptcy. For this reason, the Court finds that the second form of conduct considered by the *Maxwell* court, that is, the actions taken by a creditor to participate in the bankruptcy proceeding, is the conduct that is relevant here. In this case, that conduct supports the conclusion that this case does not involve extraterritorial action. Unlike the banks in *Maxwell*, HKSB voluntarily participated in the United States bankruptcy by filing a proof of claim before the bankruptcy court for its portion of the $200 million bank syndicate loan. In *Langenkamp*, the Supreme Court case cited by the *Maxwell* court, the Court held that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting itself to the bankruptcy court's equitable jurisdiction. *Langenkamp*, 498 U.S. at 44; *see also Granfinanciera*, 492 U.S. at 58-59 & n.14. In issuing an injunction pursuant to § 524, the bankruptcy court acts within the scope of that jurisdiction. Section 524 therefore need not be applied extraterritorially in order to bind HKSB.

HKSB attempts to avoid this conclusion relying on the fact that it did not file a claim regarding the $24 million loan and it is that loan on which it is seeking to collect. The Supreme Court's analysis in *Langenkamp*, however, suggests that the bankruptcy court's equitable jurisdiction cannot be parsed claim by claim. In *Langenkamp*, within the ninety-day period immediately preceding the debtors' Chapter 11 filing, the creditors redeemed some, but not all of the certificates issued to them by the debtor financial institutions. For those certificates that had not been redeemed, the creditors filed proof of claims against those institutions' bankruptcy estates. Notwithstanding the fact that the creditors had not filed proof of claims for the certificates they had redeemed, the Court found that the bankruptcy court's equitable jurisdiction extended to the trustee's preference action regarding those certificates. As the Court observed, "the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." 498 U.S. at 44 (emphasis in original).

Nor does HKSB's argument regarding §§ 508 and 304 compel a different conclusion in the context of property outside the bankruptcy estate. As noted above, HKSB argues that the inclusion of these sections in the Bankruptcy Code illustrates that a bankruptcy discharge granted in a proceeding in this country does not have effect beyond this nation's borders. Section 508 provides that a creditor who has received payment for a claim in a foreign proceeding may not receive payment in a United States proceeding until the creditor has shared the consideration it has received with the other creditors here. 11 U.S.C. § 508(a). While this section acknowledges the reality that foreign and United States proceedings may take place concurrently, there is nothing in the provision to suggest that a discharge obtained in a United

States proceeding does not have world-wide effect. The provision merely limits a creditor's ability to participate in the asset distribution process of the United States proceeding while at the same time sheltering assets it recovered in foreign proceedings.

Section 304 provides that where a foreign bankruptcy case is pending, the foreign representative may file a petition to administer assets located in this country. 11 U.S.C. § 304. Also in the case of § 508, the Court finds no inconsistency between the result it reaches in the instant action and this section. Because, as noted above, § 304 does not create a full bankruptcy proceeding, it does not contemplate the concurrent existence of a foreign proceeding and a proceeding in this country that could result in a world-wide discharge. The fact that Congress in adopting § 304 created an expedited mechanism whereby a foreign representative can protect assets that are part of a foreign bankruptcy estate without pursuing a full United States bankruptcy proceeding supports the view that Congress understood that dual bankruptcies would in some cases be redundant and potentially result in conflicting judgments. It does not suggest that Congress intended to limit the scope of the discharge available through a full United States proceeding.

More to HKSB's point is the fact that, instead of initiating an ancillary proceeding under § 304, a foreign representative may at its option initiate a full United States involuntary bankruptcy proceeding under § 303 in which the foreign debtor is afforded the same treatment as a domestic debtor. 11 U.S.C. § 303(b) (4); *Matter of Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597, 606-07 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991). The mere recognition by Congress of the possibility of concurrent foreign and domestic bankruptcy proceedings, however, does not indicate that Congress did

not intend discharges obtained in the United States to have world-wide effect. For example, Congress could have contemplated the possibility that a foreign bankruptcy would not offer a worldwide discharge, and wished to make such relief available to debtors notwithstanding that they were already participating in proceedings abroad. Congress could have also envisioned that a foreign sovereign might not recognize the discharge created by the United States proceeding. In such circumstances, a debtor as a practical matter would have to initiate proceedings under the laws of that nation to obtain enforceable relief. Section 303(b) (4) assures that complete relief is available to debtors where proceedings have been initiated in another country; it does not limit the scope of relief available under United States law.

CONCLUSION

For the foregoing reasons, the judgment of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED.
s/
CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE
Copies mailed to counsel
as noted on the following page

Footnotes

1. In its opening brief at page 26, HKSB suggests that it is interested in pursuing assets outside the scope of the bankruptcy estate, and Mr. Simon correctly observes at page 20 of his opposition that HKSB never states that it will not pursue assets that are part of the bankruptcy estate. In its reply at 6, HKSB does not deny this, but responds that it was Mr. Simon's duty under 11 U.S.C. § 542(a) to turn over any assets that are part of the estate to the bankruptcy trustee long ago. Given that some dispute exists with regard to both forms of property, the Court will address them both.

2. Section 1334(e) superseded § 1471 (e). For purposes of this discussion, the two provisions are identical.

Filed 4/17/95

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re: William Neil SIMON, Debtor.

HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff,

v.

William Neil SIMON, Defendant

(Bankruptcy No. 94-46497 NT)
(Adversary No. 95-4314 AN)

ORDER

In accordance with the record established at an April 12, 1995 hearing on the Defendant's Motion to Dismiss, the above captioned adversary proceeding is hereby dismissed with prejudice.

IT IS SO ORDERED.

s/
Randall J. Newsome,
United States Bankruptcy Judge

Filed 4/17/95

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re: William Neil SIMON, Debtor.
HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff,

v.

William Neil SIMON, Defendant

(Bankruptcy No. 94-46497 NT)
(Adversary No. 95-4314 AN)

NOTICE OF ENTRY OF ORDER OR JUDGMENT AND CERTIFICATE

NOTICE IS GIVEN THAT the following, ORDER DISMISSING ADVERSARY PROCEEDING WITH PREJUDICE filed on 4/17/95, was entered on the docket 4/17/95.

Further, I certify that I mailed a copy of this notice to the parties at addresscs listed below.

Dated: 4/17/95

HOWARD WEG
ORRICK, HERRINGTON
& SUTCLIFFE
777 S. FIGUEROA ST.
LOS ANGELES CA 90017

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DREYFUSS
WENDEL, ROSEN, BLACK
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P.O. BOX 2047
OAKLAND CA 94604

Filed 4/27/95

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(OAKLAND DIVISION)

In Re: William Neil SIMON, Debtor.
HONG KONG AND SHANGHAI BANKING CORPORATION, LIMITED, Plaintiff,

v.

William Neil SIMON, Defendant

(Bankruptcy No. 94-46497 NT)

A.P. No. 95—4314 AN
TRANSCRIPT OF PROCEEDINGS
STATUS CONFERENCE
DEFENDANT'S MOTION TO DISMISS
DEFENDANT'S MOTION TO STRIKE

Dated : 4/12/95 Oakland, CA

BEFORE THE HONORABLE RANDALL J. NEWSOME
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:
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THE COURT: Okay. I'm prepared to rule on this. I did give it some thought. I have to -- it will be apparent to anyone that reviews this that I'm no international law expert, I'll tell you that. That isn't something they taught me in law school, but I have read the pertinent authorities and I'm prepared to rule on this.

This matter is before the Court pursuant to a motion to dismiss under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as incorporated into Bankruptcy Rule 7012.

The matter being fully briefed, I make the following findings:

First, I find that there is a case or controversy for federal jurisdiction purposes for the reasons stated in *In re Hendricks*, 986 F2d.195-198, Seventh Circuit (1993.) The creditor should not have to guess whether it will be held in contempt of the discharge injunction, even though the facts may not be actually in place at the point of time in which the lawsuit is brought, and that's essentially what the Seventh Circuit held, and I agree with that.

Second, I find that under no statement of the facts would the law entitle the Plaintiff to relief, and thus the motion to dismiss under Rule 12(b)(6) must be granted.

I need not and do not address whether the discharge io injunction would have any binding effect on the Hong Kong courts or be recognized as a bar to collection attempts in Hong Kong. I assume it would not, but it obviously does apply to entities over which this Court has personal and subject matter jurisdiction and by its own admission, that includes the Plaintiff.

It follows that Plaintiff may do as it wishes in Hong Kong, but it must pay the price for doing so here. I would note that any action -- and this is probably not applicable given the comments that have been made -- but I would note that any action taken against property held by the Debtor when he filed for the Chapter 7 case for relief would not only

violate the discharge injunction, but also 362(a)(3) as well, since the Chapter 7 trustee has not abandoned anything in this case.

I'm told by counsel for the Defendant here that there is no such property, and there's been really no suggestion by counsel for the Plaintiff that there is, but I would make that note -- I would make that comment in passing.

Any attempt to collect on the discharge debt owed the Plaintiff would violate the discharge injunction. If the creditor initiates suit in Hong Kong, the Debtor may initiate a suit under §524 in this Court, seeking a contempt order, damages and attorney's fees.

While such a contempt order may or may not be enforceable in Hong Kong, it most assuredly would be enforceable in the U.S. by way of appropriate collection proceedings against Plaintiff's property located in the United States.

While it is true that Congress may or may not extend extraterritorial effect to its laws as to American citizens employed by American companies in another country, it is certainly true that U.S. laws apply to U.S. citizens in the United States, *EEOC versus Arabian American Oil* does not say otherwise. And Plaintiff cites nothing to support the proposition that foreign nationals doing business in the United States are not governed by U.S. laws, nor in candor, do they suggest otherwise.

The U.S. may have no interest in regulating what -- what goes on in Hong Kong or what the courts in Hong Kong do, but it does have an interest in insuring that the

companies in this country comply with the laws of the United States.

Plaintiff's request to modify or for a modification of the discharge injunction also fails to state a cause of action. Unlike the cases involving plaintiffs who seek recovery from a debtor's insurance company, any suit seeking recovery from the debtor personally, could hardly be a characterized as only nominally against the debtor or not really an action to recover on a personal obligation of the debtor.

No legal basis exists or can be imagined for modifying the discharge injunction where the discharge injunction actually applies.

Accordingly, the motion to dismiss under Rule 12(b)(6) is hereby granted in its entirety with prejudice.

Anything -- any questions? All right.

MR. COOPER: No, Your Honor, thank you.

THE COURT: We will stand in recess until 11:00 o'clock.

MR. WEG: Thank you.

(Whereupon, the proceedings are concluded at 10:34 a.m.)

Case Number	United States Bankruptcy Court
94-046497 nt	Chapter 7 Discharge of Debtor
Soc. Sec./Tax ID Nos.	Address of Debtor
In re	662 Old Quarry Rd. N.
William Neil Simon, 373-48-1188, aka Bill Simon	Larkspur, CA 94939

It appearing that a petition commencing a case under title 11, United States Code, was filed by or against the person named above on 9/28/94, and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court (or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, the objection was not sustained);

IT IS ORDERED that:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   a. debts dischargeable under 11 U.S.C. § 523;

   b. unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. § 523(a);

   c. debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

U.S. Bankruptcy Court
1300 Clay St
P.O. Box 2070
Oakland, CA 94604

By the Court:

Randall Newsome
Bankruptcy Judge

Date: 1/29/95